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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 509

MALVIN VOLK,

Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

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DARK PAGE BLEED THRU

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner, Malvin Volk, prays that writ of certiorari issue to review the judgment of the United States Court of Claims which was entered in the above case on June 5, 1951, and became final by the denial of a motion for a new trial on October 2, 1951. The Opinion of the Court of Claims is not published in the Court of Claims Reports, but is included as a part of the record herein (R. 19 to 20).

Jurisdiction

The jurisdiction of this Court is invoked under Section 28, U. S. Code 1255, and the Appendix to the Rules of the

Supreme Court of the United States, Sec. 240, Subsection 3 (b).

Statement of the Case

In 1936, the Petitioner purchased 400 machine gun tripods from the Albo Trading Corporation. In 1937, Petitioner purchased an additional 1,800 Hotchkiss machine gun tripods from the Albo Trading Corporation. These tripods were a part of a lot of materiel purchased by the Albo Trading Corporation in 1933 from the Respondent (Findings 1, 2, R. 12 and 13). These tripods had never been unpacked from the original cases in which they were delivered to the Respondent and all had been processed to prevent rust and deterioration.

In 1936, Petitioner sold a number of tripods as souvenirs for $25.00 each, and which he continued selling as souvenirs (Finding 3, R. 13).

The Petitioner sold the Greek Government 500 of these tripods in December, 1936 at $48.50 each. Between December, 1940 and January, 1942, 507 of the tripods were sold to the Van Karner Chemical Arms Corporation at $50.00 each.

In January, 1942 the Petitioner sold 30 of the tripods and in May, 1942, 10 of the tripods at $50.00 each, all to the Stafford Ordnance Corporation.

Other than the sale to the Greek Government, the sales were made in conjunction with the sales of guns, and it was agreed that the Albo Trading Corporation could supply Petitioner's tripods to purchasers of the Albo Trading Corporation's guns. The tripods were sold as and when the Albo's guns were reconditioned by Albo's customers (Finding 4, R. 13).

In 1940, Petitioner entered into a contract, through the British Purchasing Commission, for the sale of all of his tripods to the French at $50.00 each. This sale fell through when delivery was tendered because of the fall of France to

the Germans, and settlement was made with Petitioner for the breach of the contract (Finding 5, R. , and R.).

On November 16, 1942, 241 of Petitioner's tripods and 46 of Petitioner's tripod bases were requisitioned from Petitioner (Finding 7, R.). The Court awarded Petitioner as just compensation therefor $212.00, that amount being the scrap value of the tripods and bases (Finding 14, and Conclusion of Law, R.).

Relevant Parts of Statute Relied Upon
Appendix, Record —

Questions Presented

In Finding 5, (R. 14), the Court found that "the entire lot of tripods owned by Plaintiff *was to be* sold to the French." The record shows that the entire lot of the tripods was sold to the French, and the French, due to the fall of France, did not accept them when delivery was tendered but made a settlement with the Petitioner for its failure to carry out its contract * (Albo 30-2, 36-40).

The Court below failed to find the terms of the requisition showing that the Respondent was only authorized to requisition machine guns, operating, non-operating, or obsolete, and all parts therefor. The terms of the requisition should have been found.

The Court failed to find that after 1940, Petitioner's tripods, sold in conjunction with the Albo Trading Corporation's guns, were not sold to either the United States or its Allies but to licensed arms dealers (Albo, Paley 363-7).

The Court in its Finding 11, (R.), beginning with the words "During the period", in the seventh line, made elab-

* The evidence in this case was jointly taken with the evidence in *Albo Trading Corp.* v. *U.S.*, No. 48517, which case is in this Court No. 508 of the October Term, 1951. The respondent designated the entire joint evidence in these cases. That joint evidence was sent to this Court. We therefor refer to that evidence as "Albo".

orate findings as to other tripods Respondent was making at that time. We submit that that part of the Finding is not pertinent to the issues in this case.

The Court's Finding 12, (R. 18) is not pertinent to the issues in this case.

The Court's Finding 13, (R. 19) is not sustained by the evidence. The evidence shows that Paley, President of the Albo Trading Corporation, had invented an adapter to be placed on the tripod so that the tripod, with such an adapter, could be used with any type of machine gun. The Court erroneously found that there was no satisfactory evidence of secondary use of these tripods that were economically available in 1942.

The Court erred as a matter of law in its Finding 14 (R. 19), in holding that the tripods in November, 1942 had no value in excess of their scrap value, and it should have awarded Petitioner the market value for the tripods and bases as shown by the record of sales up to the time of requisition; that the fair and just compensation under the fifth amendment to the Constitution and the Act of October 16, 1941 (C. 45, 55 Stat. 742) for the Petitioner's property requisitioned was not scrap value to the Respondent but the market value as shown by sales of such property prior to the date of sale.

Reasons Relied Upon for the Allowance of the Writ of Certiorari

(1) The Court found as facts certain matters material to the issues that were not sustained by the evidence.

(2) The Court failed to find facts relating to material issues in the case that were established by the evidence.

(3) The Court failed to apply the rule established by this Court as to the determination and just compensation for property taken by the Government.

(4) That if the rule of the Court, for determination of the just compensation required to be paid under the Constitution and the Act under which the property was taken, is adhered to, the Respondent can in the future take property of individuals and disregard its value established by sales over a period of years and determine the value to be only for scrap purposes.

(5) The rule of the Court is in error in that it held that the value of the property taken is the value to it as scrap and disregarded the value of the property to the Respondent.

(6) The Court ignored the clear mandate of Congress to determine the amount of fair and just compensation for the property taken.

Conclusion

For the foregoing reasons, it is respectfully submitted that this Petition should be granted.

HORACE S. WHITMAN,
Attorney for Petitioner.

JULIUS B. LIMER,
Of Counsel.

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APPENDIX

Relevant Parts of Statutes Involved

Act of October 16, 1941, Chapter 445, 55 Stat. 742: Section 721—Requisition of Military Material for the United States; Compensation.

Whenever the President, during the national emergency declared by the President on May 27, 1941, * * * determines that (1) the use of any military or naval equipment, supplies, or munitions, or component parts thereof, or machinery, tools, or materials necessary for the manufacture, servicing, or operation of such equipment, supplies, or munitions is needed for the defense of the United States * * *, he is authorized to requisition such property for the defense of the United States upon the payment of fair and just compensation for such property to be determined as hereinafter provided and to dispose of such property in such manner as he may determine is necessary for the defense of the United States. The President shall determine the amount of the fair and just compensation to be paid for any property requisitioned and taken over pursuant to this Act * * *, but each such determination shall be made as of the time it is requisitioned * * * in accordance with the provision for just compensation in the fifth amendment to the Constitution of the United States. If, upon any such requisition of property, the person entitled to receive the amount so determined by the President as the fair and just compensation for the property is unwilling to accept the same as full and complete compensation for such property he shall be paid 50 per centum of such amount and shall be entitled to sue in the United States Court of Claims * * * for an additional amount which, when added to the amount so paid to him, he considers to be fair and just compensation for such property. * * *

BRIEF IN SUPPORT OF PETITION

The Judgment and Opinion of the Court of Claims in this matter is not printed in the Reports of that Court but it is included in the record hereof, (pp. 19 to 20).

The Grounds on Which the Jurisdiction of This Court Is Invoked

1. The Court failed to find material and pertinent facts duly proven.

2. The Court found as facts matters that were not sustained by the evidence.

Appendix to Supreme Court Rules, Act of February 13, 1925, as amended. Section 240, subsection 3 (b).

3. The Court failed to follow the proper rule, as established by this Court, for the determination of just compensation for the Petitioner's property requisitioned.

4. The Court in its judgment awarded the Petitioner the value of the property requisitioned to the Respondent and disregarded the real value of the property requisitioned as determined by sales over a period of years.

Statement of the Case

A sufficient Statement of the Case is contained in the Petition filed herewith.

Assigned Errors

The Court failed to find material facts relating to the sale of the tripods involved which established the market price therefor. The Court found as facts matters that were not sustained by the evidence. The Court did not apply the proper measure of damages to determine just compensation to which the Petitioner was entitled.

Argument

The Court in Finding 5 (R. 14), found that the entire lot of tripods owned by Petitioner *was to be* sold to the French. The record shows that all of the tripods were sold to the French at $50.00 each, and that, due to the fall of France in 1940, delivery was refused when tendered at the dock and the British Purchasing Commission, through which the sale had been negotiated (Albo, Sagor 30-32, 36-40) settled with the Petitioner for the breach of the contract.

The terms of the requisition were not found by the Court and they are material to the issues herein and should have been found.

The Court failed to find that after 1940, Petitioner's tripods were sold in conjunction with the Albo Trading Corporation's guns. They were taken by Albo's vendees not at the time the guns were sold but at a subsequent date when the guns were reconditioned by Albo's vendees (Albo, Plaintiff's Exhibit No. 15). None of the tripods were sold to the United States but to licensed arms dealers who were using them in connection with their reconditioned guns. The United States or its Allies, after 1940, did not constitute any part of Petitioner's market for the tripods (Albo, Paley 363-7).

The Court in its Findings 11 and 12 (R. 18), made findings with regard to tripods that were being made by the French and the United States, beginning after World War I. Such tripods were not available either to the Petitioner or to Petitioner's customers, and the fact that these other tripods were being made, did not affect Petitioner's market as the Petitioner was selling his tripods well up into 1942 and would have sold others as soon as the Albo guns had been reconditioned. These other tripods had no affect whatever on Petitioner's market. The fact that there were

more mutilated and reconditioned guns than tripods available, added to the value of the Petitioner's tripods.

The Court in its Finding 13 (R. 19), misconstrued the evidence as to adapters. The uncontradicted evidence is, that Paley had devised an adapter that was placed on the tripod and not on the gun, and with such adapter any type of gun could have been used on the tripod. These tripods are admittedly not as versatile as the new type of tripod, but they did function as tripods for the Marlin and other guns and were being purchased by purchasers of these guns because of the fact that such purchasers could not secure the new type of tripod.

The same questions of law, relating to the determination of just compensation for the property taken, are in this case argued at some length in the case of the Albo Trading Corporation, filed simultaneously herewith. The Petitioner prays the Court to consider the Brief on the questions of law in that case as applicable to this case. This case and the Albo Trading Corporation case were companion cases and were heard in the Court of Claims and so treated.

We submit that this case below is contrary to this Court's established rule for determining just compensation for private property taken for public use; that it establishes new and dangerous principles. Furthermore, the Court below found as facts matters that were not proven and failed to find proven facts. This Court should review these errors of law and facts.

Respectfully submitted,

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JULIUS B. LIMER,
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